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No. 261.

In the Supreme Court of the United States

October Term, 1906.

GOAT & SHEEPSKIN IMPORT COMPANY,
Appellant,

against

THE UNITED STATES,
Appellee.

Brief for Appellant.

HATCH, KEENER & CLUTE,
Attorneys for Appellant,
100 Broadway,
Borough of Manhattan,
New York,
N. Y.

EDWARD S. HATCH,
J. STUART TOMPKINS,
Of Counsel.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK

IN THE

Supreme Court of the United States

GOAT & SHEEPSKIN IMPORT COMPANY, Appellant, against THE UNITED STATES, Appellee.	No. 261. October Term, 1906.

Brief for Appellant.

This cause is before this Court on a writ of certiorari allowed on the petition of the Goat & Sheepskin Import Company to review a decision of the United States Circuit Court of Appeals for the Second Circuit, sustaining an assessment of duty on certain importations of the appellant at the Port of New York.

The merchandise of the importations was skins of the mocha whitehead sheep, from Hodeida, Arabia, on which was a growth claimed by the importer to be hair, but returned by the collector as wool of the third class, on the skin, and assessed for duty at three cents per pound under the provi-

sions of Paragraphs 351, 358 and 360 of the Tariff Act of July 24, 1897. Those paragraphs are as follows:

> "351. Class three, that is to say, Donskoi, "native South American, Cordova, Valpa- "raiso, native Smyrna, Russian camels' hair, "and all such wools of like character as have "been heretofore usually imported into the "United States from Turkey, Greece, Syria and "elsewhere, excepting improved wools herein- "after provided for."
>
> "358. On wools of the third class and on camels' hair of the third class the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound."
>
> "360. The duty on wools on the skin shall be one cent less per pound than is imposed in this schedule on other wools of the same class and condition, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe."

The importer duly protested against the classification, claiming that the merchandise was entitled to entry free of duty under Paragraph 664 of the free list of the Tariff Act, admitting without duty:

> "Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this Act."

In some of the protests the substance on the skins was also claimed to be free of duty under Paragraph 571, which reads:

> "Hair of horse, cattle, and other animals, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for in this Act; and human hair, raw, uncleaned, and not drawn."

It appeared that the substance on the skins, when washed and removed from the skins, sold for from three to five cents a pound, which was less than the cost of removing it. The assessment of duty was therefore about 100% ad valorem (fol. 37).

Before the Board of United States General Appraisers six witnesses testified on behalf of the importer, principally as to the character, use and commercial designation of the merchandise. Those witnesses were Mr. Helmrath, Secretary of the appellant corporation; Mr. Souls, a dealer in hair and wool, who had for eleven or twelve years handled an article like the growth on these skins; Mr. Klauder, for about seven years a tanner, and who had been in the wool dyeing buiness from 1878 to 1899; Mr. Parkhurst of the D. M. Smith Company, dealers in hair and wool, who had handled the substance for ninteen years; Mr. Simon, who had been engaged in the wool business in this country for thirty years, and Mr. Kitching, the government examiner, who made the return.

A sample of the skins on the growth of which the duty was assessed was offered in evidence as Exhibit I.

The Board of Appraisers overruled the protests on the ground that the question was the same as that involved in *G. A. 4593*, and on the authority of *Lyon* v. *Marine*, 55 Fed. Rep., 964, and held that the growth on the skins was properly classified as wool of the third class (fols. 50-51).

From the decision of the Board of Appraisers the importer duly appealed to the United States Circuit Court, for the Southern District of New York.

Before a Referee appointed by that Court, the

importer offered further the testimony of Mr. Weiler, manager of the importing corporation for about four years, and its foreign buyer for about thirteen years in Arabia and other foreign countries; and of Mr. Kitchie for twenty years an importer and wholesale dealer in wool and hair; and also offered in evidence a sample of the merchandise involved in *G. A. 4593*, produced from the office of the Board of General Appraisers, which was marked Illustrative Exhibit A.

No testimony was offered by the Government, the testimony of the above witnesses being in all respects uncontroverted.

The Circuit Court affirmed the decision of the Board of Appraisers in an opinion by TOWNSEND, J. (fols. 70-71). Their decision was sustained on a further appeal to the United States Circuit Court of Appeals, for the Second Circuit (fol. 84).

The importer thereupon applied to this Court for a writ of certiorari directed to the Circuit Court of Appeals, which was granted on the 1st day of May, 1906, and in this connection we respectfully direct the attention of the Court to pages 4 to 22 inclusive of our brief in support of the petition for a writ of certiorari.

POINT I.

The growth of the skins must be classified according to its commercial designation.

Hedden v. Richard, 149 U. S., 346, 348-349.

American Net and Twine Co. v. Worthington, 141 U. S., 468, 471.

Arthur v. Morrison, 96 U. S., 108.
Two Hundred Chests of Tea, 9 Wheat., 430, 438.
In re Wise, 73 Fed. Rep., 183, 188 and cases cited.

In American Net and Twine Co. v. Worthington, 141 U. S., 468, 471, this Court said:

> "It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied."

In the case of *Two Hundred Chests of Tea*, *9 Wheat*, *430*, *438*, Mr. Justice STORY, writing the opinion of the Court, said:

> "Congress must be understood to use the word (bohea tea) in its known commercial sense. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic."

In *Hedden* v. *Richard*, 149 U. S., at pages 348-349, this Court said:

> "The language of commerce, * * * *particularly when employed in the denomination of articles*, must be construed according to the commercial understanding of the terms used."

When, therefore, in the schedule of the Tariff Act covering various grades of wool the Congress imposed a duty on wools of the third class on the skin, they must be understood as imposing that duty on an article known in commerce as wool, something that is wool according to the understanding of dealers in the article and the usages of trade, not on an article that is not wool, is never known as wool, and cannot practically be used as wool.

The evidence in this case is wholly uncontroverted that the substance of these Mocha white head-sheepskins, according to the general and uniform trade understanding, is not wool, but, on the contrary, is hair, and it follows that the collector's classification of the substance as wool of Class 3 was erroneous.

The Government failed to call a single witness to substantiate its claim. On the other hand the importers called six witnesses before the Board, and three additional witnesses in the Circuit Court, some of them well known and generally recognized as men of high standing and probity, and their combined evidence is wholly convincing that the substance or growth on these skins would not be and never has been recognized in the trade as wool, that on the contrary it has always been generally and uniformly bought and sold only under the name of "mocha hair," and is so known and recognized not only in commerce, but also according to common understanding; that it is used for pur-

poses other than those to which wool is applied—and that *this mocha hair would not be accepted as a good delivery under an order for even low grade wool.*

Testimony of:

Mr. Ritchie, fols. 199-202.
Mr. Souls, fols. 86-89.
Mr. Klauder, fols. 97-98, 101, 104.
Mr. Parkhurst, fols. 113-115, 117-119.
Mr. Simon, fols. 126-127.
Mr. Weiler, fols. 191-192.

The testimony of every one of the six commercial witnesses above referred to, it is submitted, strongly tends to prove that the covering on these low grade sheepskins on and prior to July 24, 1897, would never have been considered, accepted, or sold as *wool*, but on the contrary, it was on and prior to July 24, 1897, uniformly regarded, bought and sold at wholesale in the United States as hair.

We respectfully urge this general and uniform commercial understanding and usage, excluding this article from the category of merchandise regarded in trade as "wool," and including it in the category of merchandise known as "hair," should be taken into consideration tion and be given weight in determining whether or not this merchandise was properly classified by the Collector under Paragraph 358 of the Tariff Law of 1897, as "wool."

Chew Hing Lung v. Wise, 176 U. S., 156, 161.
Arthur v. Morrison, 96 U. S., 108, 110.
Elliott v. Swartout, 10 Peters, 137, 151.
Hedden v. Richard, 149 U. S., 346, 349.

It is not material that it is physically possible

to use the article for some of the purposes for which wool is used, or that it occasionally may be used for such purpose.

An occasional or possible use is not sufficient to affect the classification of an article for tariff purposes.

Chew Hing Lung v. Wise, 176 U. S., 156, 162.
Magone v. Wiederer, 159 U. S., 555.
Hartranft v. Langfeld, 125 U. S., 128.

As the rule was stated by this Court in *Hartranft v. Langfeld, supra*, the chief or principal use controls the classification, although the goods are sometimes used for other purposes.

And in Meyer v. Cadwalader, the Circuit Court of Appeals said that it was the chief or predominant use to which an article is applied that determines its classification, even though it might be "commonly, generally, and practically, and not merely exceptionally used for other purposes."

Upon the testimony it is undisputed that the article has not the appearance or any of the qualities of wool, and cannot practically be used as wool, but as a matter of fact is hair, and is so designated and dealt in commercially.

The object of the provisions of the wool schedule is not to impose a duty on the sheepskins, but to fix the duty on wool when it is imported on a skin. As the growth on these skins clearly is not wool, and is not commercially recognized as wool, its classification cannot be found in the wool schedule.

As the article is hair, and is so known commercially, and can only be so used practically, if

it is to be separately classified, it is free of duty as uncleaned, unmanufactured hair of animals, under Paragraph 571 of the Tariff Act, covering:

> "Hair of horse, cattle and other animals, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for in this Act."

POINT II.

The evidence establishes the fact that the growth on the skins is hair, and not wool.

The testimony taken in the case, both before the Board of Appraisers and the Referee appointed by the Circuit Court, which was uncontroverted, shows:

> 1. That the substance is commercially known as hair and dealt in under that designation, and never as wool.
>
> That the commercial designation is in accordance with the actual character of the article, because
>
> 2. It has none of the characteristics of wool.
>
> 3. It is not used as wool and is not suitable for the uses to which wool is put.

1. *The commercial designation of the article is hair.*

The witnesses who testified as to the commercial designation of the goods were all men who were thoroughly familiar with the article in trade and had had many years experience in handling it in their business.

The witness, Mr. Souls, testified that he sold

the article all over the country; that he bought and sold it under the name of Mocha hair, or hair, which was its general designation (fols. 29-30); that he also handled wool, and this article was never bought or sold as wool (fol. 29).

Mr. Klauder stated that he had been buying these skins from appellant for about six years (fol. 32), and removed the growth from them and sold it as hair, never as wool (fol. 33); that he also removed wool from skins and sold it, but this substance was never sold as wool (fol 34); he could not sell it as wool, because dealers would not accept it as wool (fol. 34). Everything on Exhibit 1 he would call hair (fol. 35).

Mr. Parkhurst stated that in handling the article for nineteen years he had always bought and sold it as Mocha hair (fol. 38), never under any other name (fol. 39). His business was general througout the country, and he never knew it to be called anything else (fol. 40). He stated that the stock of from 75 to 90% of the Mocha sheepskins imported was handled by his firm (fol. 38).

Mr. Simon testified that he always sold the substance as hair (fol. 42); it was always called hair or Mocha hair (fol. 42).

Mr. Ritchie said that he bought his goods all over the world and sold all through the country, and that the growth on these skins would be called a goat hair of a low grade (fols. 65-66). That a delivery of this article would not be a good delivery on an order for low grade wool, because it was not commericially known as wool by the people who use it (fol. 67); that he would not offer it as wool (fol. 68).

There is nothing in the record which would in any way tend to impeach or contradict this testimony.

2. *The article has not the appearance or characteristics of wool.*

From the undisputed testimony, which reference to the sample corroborates, so far as it describes the growth on the skins, it appears:

That the article has not the wool fibre (fol. 30); that hair has a smooth fibre, and wool a barbed fibre (fol. 30). It has none of the appearance or feel of wool (fol. 35). It has the hair fibre and none of the qualities or appearance of wool (fol. 39). The fibres of wool are curly and will adhere to each other; this article would not adhere, but would separate as it was shaken out (fols. 42, 44).

Mr. Kitching, the Government examiner, stated that there was quite a distinction between hair and wool and that the substance on these skins was "dead hair mostly, what they call dead hair or kemp" (fol. 46).

The commercial designation, therefore, conformed to the actual character of the goods.

3. *The substance is not used as wool, and is not suitable for such use.*

It appears from the testimony that the article is used mainly, or almost exclusively, by stuffing manufacturers, manufacturers for the saddlery trade and bed manufacturers (fols. 30, 31, 39, 41, 44, 66).

It is not used as wool becaused it is not suitable for such use.

Mr. Souls stated that it could be carded, as most anything can be (fol. 32); that while it might be made into yarn, it could not be spun alone (fol. 32).

Mr. Parkhurst said that it could not be used for spinning purposes, because it would not hold to-

gether; he thought some of it had been used for spinning purposes, with other stock, but not successfully (fol. 39).

Mr. Simon testified that it could not be spun because it would not adhere like wool (fol. 44).

The Government examiner stated that it could be carded, but there would not be much left after the carding; that it would "drop under the card most"; that it was not commercially suitable for carding (fol. 46).

The testimony of the witness Mr. Weiler was that the hair was coarse and would not card; that goat hair would be worth more than it and would be finer (fol. 64).

Mr. Ritchie stated that if the hair ran pretty white it was sometimes used in low carpet yarns. It could not be used for carding purposes, as it was all dead hair (fol. 66). There would not be any money in carding it, it was all kemp and would not take any dye (fol. 67).

While it thus appears that the hair might be carded, it is clear that it was not commercially adapted for such use. As one of the witnesses said, most anything can be carded; and if it were carded, it must have been carded as hair and not as wool. There is not only an utter absence of testimony that the article was fit for the uses to which wool is put, but it appears beyond dispute that it was not fit for such uses.

POINT III.

As the value of the goods is in the skins, without regard to the growth on them, they should have been assessed for duty as raw skins, not specially provided for.

Paragraph 664, under which it is contended the goods are provided for, reads:

> "Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this Act."

It appears as a matter of fact, upon uncontradicted testimony that the goods are imported for use in the leather trade; that the subject of the importation is the pelt, and that the growth on the skins is only an incident of the real article of merchandise. From a consideration of this paragraph, with Paragraph 571, it is clear that Congress intended to admit free all raw skins and the growth of all such skins unless it should be wool, whether it should be on the skin or imported separately.

From the testimony it appears that as the skins are imported the hair is of different lengths, and in the importation in suit the bales ran about one-third long hair, one-third medium and one-third short (fol. 22). The importers were required to pay duty only on the growth of the long-haired skins (fol. 24), and the rest were admitted free, although the price of the skin is not influenced by the quantity of hair on it; the more hair there is, the less the skin will bring, according to weight

(fol. 24). The more hair, the poorer the skin (fol. 24).

The skins are sold by the importer to tanners of glove and shoe leather just as they arrive (fols. 25, 38, 62).

While the witness, Mr. Klauder stated he removed the hair from the skins and sold it, he stated he bought the skins solely for the pelt, to manufacture leather from (fol. 37); that he paid about the same for the short-haired as for the long-haired skins (fol. 37). That after it was washed and removed from the skins the hair brought from three to five cents a pound, which was less than the cost of removing it (fol. 37).

Mr. Weiler stated that in buying the skins a buyer would calculate that on skins of this kind he would not get as much for the growth as the cost of removing it (fol. 62); that they would be worth no more with long hair on than with short hair; that in buying the skins they took no notice of the growth, their only consideration being the value of the pelt (fol. 63).

The merchandise is raw skins, and they are not elsewhere provided for in the Tariff Act. They are not excepted from Paragraph 664 because they are sheep skins, for to be within the exception they must have wool on; it is not sufficient that they are covered with a growth which is not wool.

POINT IV.

The Circuit Court of Appeals erred in not reversing the decision on the evidence.

The finding of the Board of Appraisers and the Circuit Court that the substance on the skins was wool was wholly unsupported by the evidence, and contrary to the evidence. It should, therefore, have been disregarded by the Circuit Court of Appeals, and the question determined upon the record.

Gabriel & Schall v. United States, 123 Fed. Rep., 296.
Apgar v. United States, 78 Fed. Rep., 332.
White v. United States, 72 Fed. Rep., 251.
Marine v. Lyon, 65 Fed. Rep., 992.

Instead of deciding the case in accordance with the facts appearing from the evidence taken before them, the Board of Appraisers assumed that the merchandise was the same as that involved in *G. A. 4593*, where they had held that the growth on certain sheepskins was wool, and followed their decision in that case, and the decision in *Lyon v. Marine* (55 Fed. Rep., 964). In *G. A. 4593*, the Board had found that the growth on the skins was used as carpet wool of a cheap grade (fols. 51 54).

Before the Referee appointed by the Circuit Court, a sample of the skins, the subject of *G. A. 4593*, was produced and admitted in evidence as Illustrative Exhibit A. It was examined by the

witness, Mr. Weiler, who had been for thirteen years foreign buyer for appellant, stationed in Arabia and other foreign countries (fol. 59). He stated he had bought large quantities of the skins like both Exhibit 1 and Exhibit A, and had been handling them for twenty years (fol. 59); that they were not the same kind of skin; that the hair on Exhibit 1 was shorter and of a different nature; that the two skins were from an entirely different breed of sheep (fol. 60). He said that they were both species of the Mocha sheep, but Exhibit A came from a mountainous country near Jeddah and was from a larger sheep, the average weight of the skin being 3 1/2 to 4 pounds, and about half of them were white and half black (fol. 60). Exhibit 1 was from a Hodeida sheep, smaller and lighter, the weight of the skin being about a pound and a half, and they were all white (fols. 60-61). That the appellant imported the Jeddah skins, but did not protest against the imposition of duty, as he considered the growth on those skins to be wool (fol. 61).

In *G. A. 4593* no claim was made under Paragraph 571.

The witness, Mr. Ritchie, stated before the Referee that Exhibit A had not the percentage of kemp in that Exhibit 1 had, and would bring probably 10 to 10 1/2 cents a pound (fol. 68). The price of the growth on Exhibit 1 had been shown to be 3 1/2 to 5 cents per pound.

In the case of *Lyon v. Marine*, the subject of the protest was an article worth about 9 cents a pound, and it does not appear from the decision how it was known commercially.

There was not one word of testimony before the Board of Appraisers on which to base its opinion

excepting the statement of the examiner that he returned the skins as sheepskins with the wool on because he found on them a substance that he called wool, which made up about 10% of the growth on the skins (fol. 47).

Even though the substance contained that slight percentage of what the examiner would call wool, it was shown that the substance was sold just as it came from the skins, no effort being made to separate it (fol. 44), and that as so sold it was commercially hair, and not wool.

On the record that was before the Board of Appraisers their decision was clearly so contrary to the evidence that it should have been reversed by the Circuit Court. But on the further evidence taken before the Circuit Court it appeared beyond question that while the Board of Appraisers had ignored the record and based their decision on their findings in another case, even that ground of their decision was untenable. But the Circuit Court said in affirming the Board's decision:

> "Inasmuch as there was sufficient evidence to support the finding of the Board as to the fact of wool upon the skins, and as the Court upon examination of the sample is unable to say that this finding is incorrect, and as the definitions in the encyclopædias and dictionaries support the claim that such a product is wool, although of a low order, the decision of the Board of General Appraisers is affirmed."

It is difficult to see where either in the testimony taken before the Board or before the Court's Referee, the Circuit Court found the evidence sufficient to support the Board's finding. "Wool" is one of the terms which has been expressly held by this Court to have a commercial meaning.

Cadwalader v. Zeh, 151 U. S., 171, 176.
Elliott v. Swartout, 10 Peters, 137, 151.

And it was to the evidence of people who handled the article commercially that the Court should have looked to determine whether or not the finding of the Board was correct, rather than to an inspection of a sample of the merchandise. The most careful examination of the evidence fails to disclose a scintilla of proof that commercially this article is wool, and under what this Court has termed "a cardinal rule" the article must be commercially wool or it is not wool for tariff classification. It was not necessary or permissible for the Court to resort to encyclopædias and dictionaries where the article was commonly dealt in under a well-known designation that was general throughout the trade. The commercial not the technical designation is of first importance in determining the classification, and there was no dispute as to what the commercial designation was. Although if it had been necessary to resort to the technical definition it clearly appears that the article had none of the physical characteristics of wool.

A decision so irreconcilably in conflict with the evidence it was the duty of the Circuit Court of Appeals to reverse. It is only where there is a great conflict of testimony that the findings of the Board of Appraisers and the Circuit Court should not be disturbed on appeal.

In *re Van Blankenstyn*, *supra*, the Circuit Court of Appeals said that when a finding of fact by the Board of Appraisers was wholly without evidence to support it, "or when it is clearly contrary to the weight of evidence," it was the duty of the Circuit Court to disregard it.

In *Apgar v. United States*, 78 Fed. Rep., 332, at page 334, the Circuit Court of Appeals said:

> "In a proper case, no doubt, this Court may go back of the decision of the Board of General Appraisers and the Circuit Court, and review the case upon the evidence, and, if need be, overrule their decision. But it requires a clear case to enable the Court to do that. This Court ought not, and will not, review a finding of facts made by the Board of General Appraisers and *not controverted by new evidence in the Circuit Court*, except it be manifest that the decision of the Board of Appraisers is *unsupported by the evidence, or is clearly against the weight of evidence.*"

It would be difficult to imagine a case where the findings of either the Board of Appraisers or the Circuit Court were more clearly "unsupported by the evidence" or "against the weight of evidence."

In *Gabriel & Schall v. United States*, 123 Fed. Rep., 296, the Circuit Court of Appeals held that where the testimony as to commercial designation was "so closely balanced as to make it difficult to say on which side lies the weight of evidence," the finding of the Board of Appraisers would not be disturbed.

No such difficulty is presented here. The testimony as to commercial designation was not only not closely balanced, but there was not the slightest conflict in the testimony.

On a review of the facts the Circuit Court of Appeals must inevitably have found that according to its commercial designation the growth on the skins was not wool, and was not dutiable under the wool schedule, but that it was commercially hair, and free of duty, either as incidental to the raw skins, or as uncleaned and unmanufactured hair.

In the decision of the case the commercial designation of the merchandise was ignored, and the

article seems to have been held to be wool solely because it grew on a sheep, although in the decision *Lyon v. Marine* it was said that the Court would take judicial notice of the fact that part of the growth on sheep is hair and not wool. In this case even the Government examiner conceded that 90 per cent. of the growth was hair. The admixture of 10 per cent. of what he called wool, and at most a low grade of wool, did not make the article commercially wool. The examiner testified that he had formerly passed the skins as free (fol. 45). The appellant had been importing the skins since 1892 and no duty was imposed on the growth on them until 1899 (fol. 22). What led to the change in the practice as to classification the examiner was not permitted to state.

It appears, however, from the combined testimony of Mr. Kitching (fol. 45), and Mr. Helmrath (fol. 25), that skins like Exhibit 1 including the growth thereon were passed free of duty, at least from the time that Mr. Kitching first became examiner, 15 years prior to 1904 (*i. e.*, in 1889), up to about 1899.

During all that period of time from 1889 up to 1899 (save under the Tariff Act of 1894 when wool was on the free list), there was continuously in force under the various Tariff Acts of 1883, 1890 and 1897, a specific provision for "wools of the third class," corresponding to the provision under which duty was levied in the case at bar; and yet during all that time, embracing four different tariff laws, Mocha whitehead sheepskins were continuously and uniformly classified free of duty as "skins, not otherwise provided for," and the growth on such skins was never assessed as wool.

We respectfully urge, therefore, that this is a

clear case, not only for the application of the well settled rule of commercial designation, but also for the application of the rule laid down in

Robertson v. Downing, 127 U. S., 607, 613,

that where the language of various tariff acts has been substantially the same with respect to certain goods, the construction uniformly applied by the Treasury Department for many years will not be disregarded except for most persuasive reasons.

See, also:

Proctor v. United States (C. C. A.), 145 Fed. Rep., 126, 132.

Brennan v. United States (C. C. A.), 136 Fed. Rep., 743, 749.

POINT V.

The decision of the Circuit Court of Appeals should be reversed, and the cause remanded with instructions to the Circuit Court to enter judgment in favor of the appellant.

Respectfully submitted,

EDWARD S. HATCH,
J. STUART TOMPKINS,
Of Counsel for Appellant.

HATCH, KEENER & CLUTE,
Attorneys.